



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

**Issued by the Department of Transportation  
on the 9th day of November, 1999**

**Aloha Airlines, Inc.**

**Violations of 49 U.S.C.  
§ 41712 and 14 CFR 399.81**

**SERVED: November 9, 1999**

**CONSENT ORDER**

This consent order concerns on-time performance advertising by Aloha Airlines, Inc. (Aloha), a certificated air carrier, that constitutes violations of 49 U.S.C. § 41712 and 14 CFR 399.81, as well as improper advertising of claims regarding consumer complaint records that also violate 49 U.S.C. § 41712. This order directs Aloha to cease and desist from future similar violations and to pay compromise civil penalties.

Aloha is a Honolulu-based carrier that operates domestic scheduled passenger air transportation. Aloha, as an air carrier, is subject to the advertising requirements of Part 399 of the Department's rules (14 CFR Part 399). Section 399.81 requires that certain information be published with each on-time performance advertisement to enable consumers to make valid comparisons. After the adoption of section 399.81, the Department amended 14 CFR Part 234 (52 Fed. Reg. 34071, September 9, 1987) to require certain large air carriers to report their on-time performance to the Department. Aloha is not one of the carriers required to report on-time data and has elected not to do so. Using the data collected, the Department in turn publishes a monthly consumer report, entitled the Air Travel Consumer Report, containing, among other data, summaries of each reporting carrier's on-time performance over various time periods.

As a result of the existence of this data source, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office), as a matter of enforcement policy, has allowed carriers subject to the on-time performance reporting rule some flexibility in advertising their on-time performance. However, the Department's enforcement case law in conjunction with section 399.81 consistently has required that any such advertisement (1) be accurate, (2) be based on (and state that it is based on) recently published arrival data in the Department's Air Travel Consumer Report, (3) state the time period covered by any on-time performance claim, which must correspond with a time period utilized in the report (e.g., previous month, quarter, year or data base to date), and (4) accurately identify the carriers or types of carriers (e.g., "major," "seven largest") being used for comparison purposes. See, e.g., Northwest Airlines, Order 93-3-24 (issued March 19, 1993).

The "Guarantee Program" advertisement placed by Aloha in *The Honolulu Advertiser*, *The Honolulu Star Bulletin*, and four other Island daily newspapers, between December 8 and 20, 1998, and the text of the carrier's brochure for its "Guarantee Program," distributed starting December 15, 1998, state that Aloha "has had the best on-time record for nearly two decades." However, neither the advertisement nor the brochure included any of the information required by section 399.81 or the Department's enforcement case law pertaining to the basis for Aloha's claim. The advertisement did not mention, as required by section 399.81, the basis for the calculation, the relevant time period, the pairs of points or percentage of system-wide operations represented by the on-time claim, and whether the claim is based on all scheduled flights or only scheduled flights actually performed. Moreover, Aloha has elected not to file with the Department relevant on-time data under 14 CFR Part 234; therefore, there is no way to verify its on-time performance claims, even in comparison with the filing carriers.

In addition, the Aloha "Guarantee Program" advertising in question also states that "We have had the lowest incidence of consumer complaints." The ads and brochure make this statement without disclosing the basis for the assertion, including the flights at issue, the competing air transportation service(s) to which Aloha's record is being compared, or the time period involved. Moreover, the statement is not accurate based on complaints against all airlines filed with the Department.

As published, the promotional materials violate 49 U.S.C. § 41712, which prohibits "unfair or deceptive practices or unfair methods of competition." The on-time performance ads also violate section 399.81 of the Department's regulations because they failed to disclose adequately the relevant factual basis for Aloha's representing itself as having the best on-time record.

Aloha has explained that its primary purpose in placing the “Guarantee Program” advertisements and issuing the brochure was to announce a program which offers a free ticket to any passenger that complains about Aloha’s service by completing a simplified complaint form. Aloha sends each such passenger a free ticket without requiring any further documentation. Aloha also states that its on-time performance advertisements did not specify that the claim was based on third-party focus-group surveys of Hawaiian residents, the time periods covered by those surveys, the city-pair markets reflected in the survey responses, or the carrier(s) to which Aloha’s performance was compared. In mitigation, Aloha indicates that it has modified its approach and in the future will advertise on-time performance claims only when it can satisfy all of the requirements of the Department’s rule and enforcement policy; for example, where, as here, Aloha’s focus group surveys reflect the views of a combination of Hawaiian residents and Aloha passengers, as opposed to operational data actually reflecting the on-time performance of Aloha or its competitors in the inter-island markets, Aloha will accurately state those facts. Aloha also states that the Department’s consumer complaint records show that Aloha has a lower incidence of consumer complaints than its principal local competitor. Aloha acknowledges, however, that it did not specify the data source or identify the carrier with which Aloha intended to compare its performance. Henceforth, Aloha will similarly specify clearly the data source and time period, as well as the competitors whose performance is being compared to Aloha’s when it makes any future claim regarding the relative incidence of consumer complaints the carriers have received.

Airlines are free to advertise either passengers’ or residents’ perceptions of an air carrier’s on-time performance, based on reasonable surveys so long as the advertisement makes it clear that the claims made are based on surveys, and the claims accurately depict the nature of such surveys (e.g., Hawaiian consumers perceive carrier X is the best on-time airline).<sup>1</sup> In addition, air carriers may compare consumer complaint records of carriers filed with the Department, provided that the comparisons are based on the Department’s data. In both consumer complaint comparison and passenger perception advertising, the advertisements must be accurate and truthful and must not be deceptive, as required by 49 U.S.C. § 41712.

The Enforcement Office has carefully considered the information provided by Aloha but continues to believe that enforcement action is warranted. In this connection, the Enforcement Office and Aloha have reached a settlement of this

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<sup>1</sup> Aloha has, however, advised the Department that it intends to file its on-time performance data in accordance with 14 CFR Part 234 with the understanding that the Department will include that data in Table 1, “Overall Percentage of Reported Flight Operations Arriving on Time by Carrier” in the monthly Air Travel Consumer Reports.

matter. Aloha consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.81, and to the assessment of \$12,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, \$6,000 shall be due and payable within 15 days of the date of issuance of this order. The remaining \$6,000 penalty amount shall be suspended for one year following the date of issuance of this order, and then forgiven, unless, during that one-year period, Aloha violates this order's cease and desist provision or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$12,000 penalty shall become due and payable immediately, and the carrier may be subject to further enforcement action. We believe that this compromise assessment is appropriate and serves the public interest. It represents an adequate deterrence to future noncompliance with the Department's consumer protection requirements by Aloha, as well as by other air carriers and foreign air carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

**ACCORDINGLY,**

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Aloha Airlines, Inc. has violated 14 CFR 399.81 by causing to be published advertisements and promotional material that made claims about the carrier's on-time performance that failed to provide the specific information needed to substantiate such claims as required by the regulation;
3. We find that by engaging in the conduct and violations described in paragraph 2 above, and by making overly broad and unsubstantiated claims about its consumer complaint record, Aloha Airlines, Inc., also violated 49 U.S.C. § 41712;
4. Aloha Airlines, Inc., and all other entities owned or controlled by or under common ownership with Aloha Airlines, Inc. and their successors and assignees, are ordered to cease and desist from violations of 49 U.S.C. § 41712 and 14 CFR 399.81;

5. Aloha Airlines, Inc. is assessed \$12,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 of this order. Of this total penalty amount, \$6,000 shall be due and payable within 15 days of the date of issuance of this order. The remaining \$6,000 penalty amount shall be suspended for one year following the date of issuance of this order, then forgiven, unless, during that one-year period, Aloha Airlines, Inc. violates this Order's cease and desist provision or fails to comply with the order's payment provisions, in which case the unpaid portion of the \$12,000 penalty shall become due and payable immediately. Failure to pay the compromise assessment as ordered will subject Aloha Airlines, Inc. to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order; and
6. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

**BY:**

**ROSALIND A. KNAPP**  
**Deputy General Counsel**

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